IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8519 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

J.A.DESAI

Versus

GUJARAT HOUSING BOARD NOTICE SERVED THROUGH

Appearance:

1. Special Civil Application No. 8519 of 1992

MR YN OZA for Petitioner No. 1,3,5,8,11,15-16,18-19, 22,25,28-31,33-35

DELETED for Petitioner No. 2,4,6-7,9-10,12-14,17,20-21, 23-24,26-27,32

MR YF MEHTA for Respondent No. 1-2

MR ND GOHIL A.G.P. for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 26/08/2004

ORAL JUDGEMENT

1. The petitioners by way of this petition have challenged the arbitrary action on the part of the respondent Board in fixing the cut-off date for the benefit of pension.

2.0. The short facts as they emerge from the record of the petition are that the petitioners at the relevant point of time were working with the respondent Board. It is the case of the petitioners that the respondent Board by Resolution dated 13th July, 1992 introduced a pension scheme alongwith certain regulations, whereby as per regulation 2 (i) benefit of grant of pension is made applicable to only those employees who have joined services after 1st April, 1990, while as per regulation 2 (ii), grant of pension is made applicable to those employees who are existing i.e. who are in service as on 1st April, 1990.

2.1. It is the case of the petitioners that the respondent Board has not made provision for grant of pension for the employees who retired prior to 1st April, 1990. It the case of the petitioners that after the said Resolution, petitioner no. 1 had made a representation to the respondent Board pointing out that the said Resolution is unconstitutional as the benefit of pension for the employees who retired prior to 1st April, 1990 have been excluded. The respondent Board vide their reply dated 27th July, 1992 rejected the representation of the petitioner. Thus, the petitioners have no other option, but approach this Court by way of this petition.

2.2. The respondent Board have appeared and contested the claim of the petitioners by filing affidavit-in-reply wherein, it is stated as under :-

> "I say that, as far as the new scheme of preferring either Pension alongwith General Provident Fund and Gratuity only on the basis of the basic pay, or the employees Provident Fund Scheme with Gujarat Housing Board's Contribution, plus gratuity on the basis of basic pay and dearness allowance came into force from 1st April, 1990. I say that, even now those who prefer the Employees Provident Fund Scheme with the contribution of the employer, plus gratuity on the basis of basic pay and dearness allowance do not get the pension alongwith general Provident Fund Scheme and gratuity on the basis of basic pay only. I say that, all the petitioners have drawn the provident fund scheme,

which include the subscription and contribution of the Gujarat Housing Board, alongwith the gratuity on the basis of basic pay, including dearness allowance. I therefore say that the petitioners have received benefit of the one scheme against the other which exist even now. I say that as the petitioners retired before 1-4-90, the pension scheme was not in force. However, the petitioners have already taken advantage of provident fund, including contribution of the employer and gratuity on the basis of basic pay, including dearness allowance. Under the circumstances, the basic contention of the petitioners that they are deprived of pension scheme is baseless. The petitioner says that those who are entitled to pension after 1-4-90 are required to go for general provident fund scheme, which do not include the employer's contribution and they are entitled to gratuity only on the basis of the basic pay. I say that the contention raised in the petition which is basically misconceived on law and facts. I further say that the pensionary benefits does not arise on the basis of any additional advantage given to the employees who retire after 1-4-90. I say that the advantage remains the same when a person prefers Employees Provident Fund scheme with employer's contribution and gratuity on the basis of basic pay and dearness allowance as the petitioners received at the time of retirement. I further say that the petitioners have withdrawn such provident fund between the years 1971 and January, 1990. I say that, on such withdrawals they have received the amount and must have invested the same and got the interest thereon. The respondent says that. at this stage now reversing the petitioners claim of pension would amount to reversing the whole scheme of provident fund and gratuity on the basis of General provident fund without employer's contribution and gratuity on the basic pay. I say that such reversal is not only impracticable but will be contrary to law. I say that if the petitioners claim, if accepted all employees who retired between years 1960 and March, 1990 will have to be given the reversal of the provident fund contribution and gratuity contribution, and number of such retired persons are more than hundred and it will lead to the financial burden on the Gujarat Housing Board for the purpose of pension to the tune of millions of rupees in

terms of future payment. I therefore, say that the employees are governed by the pensionary rules existing on the date on which he retires and he cannot claim the advantage of the further options which may have been given to the employees retiring after 1-4-90. I say, that the retrospective effect given to all the employees between 1960 and March, 1990 is impossible and is also not in accordance with law, in view of what is stated hereinabove.

2.3. In view of that the petitioners have filed affidavit-in-rejoinder and in para 2 they have contended that since they are already increasing expenses of Rs.10 crore every year, a burden of Rs.6 lakhs will not be higher on the respondent no. 1 Board. The petitioners contended that if the petition is allowed, the Board is likely to get Rs.15 lakhs by way of refund which was Board's contribution towards provident fund and with the aforesaid amount, the Board shall earn interest, which in turn will lessen the burden.

3.0. Ms. Shah learned advocate appearing for the petitioners has placed reliance on the decision of the Apex Court in the case of D.S. Nakara v. Union of India reported in A.I.R. 1983 S.C. p.130 wherein it has been held as under :-

"The fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin test of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

3.1. Ms. Shah has placed further reliance on the decision of this Court in the case of Gujarat State Retired Professors Association v. State of Gujarat reported in 1991 (1) G.L.H. p.159 and more particularly para 11, which reads as under :-

"11. Considering the above facts and legal question which has been finally settled by the Supreme Court of India in Nakara's case (supra) as well as by the High Court

of Bombay in Special Civil Application no. 2632 of 1985, the petition requires to be allowed. So far as artificial date between the employees who retired prior to April 1, 1982 and subsequently thereto, can never be said to be based on an intelligible differentia nor with the object sought to be achieved thereby. The classification is arbitrary, irrational and discriminatory. Again so far as the judgment of the High Court of Bombay is concerned, even the Special Leave Petition has been rejected. In these circumstances, all the Professors who retired even prior to April 1, 1982 must be held entitled to all the retirement benefits."

3.3. Ms. Shah has also relied upon the decision of this Court in the case of Ramesh Chandra Gupta v. Union of India reported in 1986 (1) G.L.R. p.485, wherein, this Court has held as under :-

6. Identical question with reference to O.M. No. F-19(3)-EV-79 dated May 25, 1979 had come up for consideration before the Supreme Court in D.S. Nakara v. Union of India, A.I.R. 1983 S.C. p. 130. In that case, petitioner no.1 had been a civil servant and petitioner no. 2 was a member of Services Personnel of armed forces. Third petitioner was a society sponsoring the cause of the petitioners, Government of India, Ministry of Finance issued O.M. dated May 25, 1979, whereby formula for computation of pension was liberalized. It made it applicable to government servants who were in service on March 31, 19979 and retired from service on or after that date. By Memorandum of Ministry of Finance dated September 28, 1979, the liberalized pension formula introduced for the government servants governed by the Rules was extended to the armed forces personnel with a condition that the new rules of pension would be effective from April 1, 1979 to those service officers only who become ineffective on or after that date. Petitioners contended that the differential treatment for those

retiring prior to a certain date and those retiring subsequently, the choice of the date being wholly arbitrary would be according differential treatment to pensioners who form a class irrespective of the date of retirement and, therefore, would be violative of Article 14 of the Constitution. It was also contended that classifications based on fortuitous circumstances of retirement before on subsequent to a date fixing of which is not shown to be related to any rational principle would be equally violative of Article 14. Desai J, speaking for the Constitution Bench of the Supreme Court observed that the burden lay upon the State to affirmatively establish that the twin tests are satisfied namely that the classification is founded on intelligible differentia which distinguishes persons grouped together from those that are left out of the group and that the differentia has a rational nexus to the object sought to be achieved by the statutory provision in question. The petitioners for the purpose of pension benefits, it was held, form a class. Therefore, the classification drawn was devoid of rational principle and arbitrary.

3.4. Ms. Shah has also placed reliance on the decision of the Apex Court in the case of Subrata Sen & Ors. v. Union of India & Ors., reported in (2001) 8 S.C.C. p.71, wherein the Apex Court has observed as under :-

"Pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment. It is a payment for the past services rendered. It is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch."

4.0. Mr. Mehta learned advocate appearing for the respondent-Board submitted that the issue is already covered by the decision of this Court delivered in Letters Patent Appeal no. 92 of 1993 wherein the order passed by the learned Single Judge of this Court granting

benefits was set aside and the Special Civil Application No. 4494 of 1987 was dismissed vide order dated 12th March, 1993.

4.1. Mr. Mehta has also relied upon the decision of the Apex Court in the case of State of Punjab v. Boota Singh & Anr., reported in (2000) 3 S.C.C. p.733, wherein it has been held as under :-

"6. This Court, therefore, held that since the main judgment of the High Court had become final, the same questions cannot be reagitated through the mode of an interlocutory application for clarification. It was on this ground that the appeal being Civil Appeal No. 6660 of 1994, was dismissed. The present appeal cannot be decided in the same fashion because this appeal challenges the main judgment of the High Court. The High Court's judgment and order impugned here dated 10-7-1991 has simply followed its earlier judgment in the case of Mohinder Singh v. State of Punjab decided on 22-4-1991. This judgment if 10-7-1991 is, therefore, not final between the parties and there is no question of any interlocutory application in this case having been filed before the High Court. Therefore, the reason for dismissal of Civil Appeal No. 6660 of 1994 is not applicable to the present case. The dismissal of this appeal is, therefore, not warranted.

7. On merits we find that the retirement benefits which are claimed by the respondent are benefits which are conferred by subsequent orders/ notifications. Therefore, persons who retired after the coming into force of these notifications and order are governed by different rules of retirement than those who retired under the old rules and were governed by the old rules. The two categories of persons, who retired were governed by two different sets of rules. They cannot, therefore, be equated. Further, granting of additional benefits has financial implications also. Hence, specifying the

date for the conferment of such additional benefits cannot be considered as arbitrary.

8. In the case of Indian Ex-Services League v. Union of India, this Court distinguished the decision in Nakara case and held that the ambit of that decision cannot be enlarged to cover all claims by retirees or a demand for an identical amount of pension to every retiree, irrespective of the date of retirement, even though the emoluments for the purpose of computation of pension be different. We need to cite other subsequent decisions which have also distinguished Nakara case. The latest decision is in the case of K.L. Rathee v. Union of India, where this Court, after referring to various judgments of this Court. has held that Nakara case cannot be interpreted to mean that emoluments of persons who retired after a notified date holding the same status, must be treated to be the same, The respondents are not entitled to claim benefits which became available at a much later date to retiring employees by reason of changes in the rules relating to pensionary benefits.

4.3. Lastly Mr. Mehta has relied upon the decision of this Court in the case of Harish M. Bhatt & Ors. v. Union of India delivered in Letters Patent Appeal No. 1120 of 1996 dated 26th August, 1996 wherein similar issue was raised and this Court while considering the decision of the Apex Court in the case of D.S. Nakara v. Union of India (Supra) and further explaining the subsequent decisions of the Apex Court in the case of Indian Ex-Services League v. Union of India, A.I.R. 1991 S.C. p.1182; B. Prabhakar Rao v. State of Andhra Pradesh, A.I.R. 1986 S.C. p.210; All India Reserve Bank Retired Officers Association & Ors., v. Union of India, A.I.R. 1992 S.C. p.767, has held as under :-

"The cut-off date i.e. 1-1-1986 is not arbitrarily fixed by the Bank Authorities or the Central Government while giving its approval and it is not devoid of rational consideration nor is wholly whimsical. In fixing the cut-off date the authorities had not acted mala fide with a view

to deprive those who had retired on or before 31st December, 1985 of the benefit of the Pension Scheme but it was not practicable to extend the benefit to such retirees. The rationale for fixing the cut-of date as 1st January, 1986 was the same as the case of Central Government employees based on the recommendations of the Fourth Central Pay Commission. The fact that service records of persons retired prior to cut-off date were not available also justified the reason for not extending the benefit to those who had retired before five years or more."

5.0. In that view of the matter, this being a introduction of pensionary scheme where the respondent Board had thought it fit to give effect from a particular date keeping in mind the financial burden and feasibility of the scheme, in my opinion, this Court will not substitute the decision under Article 226 of the Constitution of India which otherwise will have financial repercussions on the respondent-Board.

5.1. Even otherwise, in view of the unreported decision of this Court in the case of Harish M. Bhatt v. Union of India & Ors., (Supra) and in view of the decision of Apex Court in the case of State of Punjab v. Boota Singh & Anr. (Supra), in my opinion, the date fixed by the respondent-Board has some nexus on the implementation of the scheme and the same is not arbitrary. Therefore, no interference is called for.

5.2. Before parting with, Ms. Shah submitted that in view of the decision of this Court in the case of Harish M. Bhatt v. Union of India & Ors., (Supra), it is true that the issue now no longer exists, but some direction may be issued to the respondent-Board to consider the case for ex-gratia payment of Dearness allowance. However, in view of the Government Resolution at annexure-B to the petition, in my opinion, the expenditure is to be borne by the respondent Board and not by the State Government and in case of Harish Bhatt v, Union of India & Ors. (Supra) the Central Government has passed the order in view of the fact that LIC is a profit making institution and it might have paid the same. However, since the respondent Board is not a profit making institution, no such direction can be issued in the present case.

6.0. For the foregoing reasons, the petition is dismissed. Rule is discharged with no order as to costs.

Interim relief if any, stands vacated.

[K.S. JHAVERI, J.]

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